

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



75-1428

B  
P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

Docket No. 75-1428

-vs-

VITO M. PASTORE,

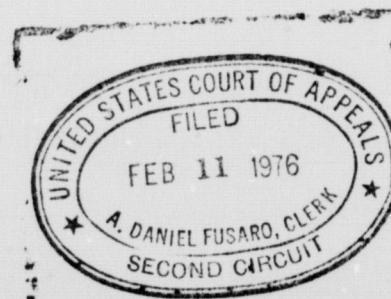
Defendant-Appellant.

ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF  
NEW YORK

APPENDIX FOR APPELLANT

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appellant  
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CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT

7-1-CR

76

D. C. Form No. 100 Rev.

TITLE OF CASE

THE UNITED STATES

vs.

VITO M. PASTORE  
11 Eastern Parkway  
Auburn, NY 13021

ATTORNEYS

For U. S.:

James M. Sullivan, Jr.  
Lowe

For Defendant:

Norman Palmieri

STATISTICAL RECORD

COSTS

DATE

NAME OR  
RECEIPT NO.

REC.

DISB.

J.S. 2 mailed

Clerk

J.S. 3 mailed

Marshal

Violation

Docket fee

Title

Sec.

DATE  
1974

PROCEEDINGS

May 8	Filed Indictment-viol: 26:7206-filing false return 1 ct	JS2
May 10	Defendant is arraigned and pleads not guilty. Signed bail form. Released on own recognition	
11/13	Filed bail form	
2/18/75	Over to January term at Utica, time excluded Filed Order signed by Judge Port setting pre-trial motions returnable March 10, 1975 at Syracuse.	
3/4/75	Over the term - May session at Auburn. Request of defense counsel. Time excluded.	
3/7/75	Filed Stipulation that pre-trial motions are returnable at Syracuse, N.Y., April 14, 1975.	
3/21/75	Filed Omnibus Motions - returnable April 14, 1975 Syracuse, for Order suppressing evidence pursuant to Rule 21(e), etc.	
4/15/75	Filed Memorandum of U.S. in response to the Defendant's pre-trial motions.	
4/14/75	Motions adjourned to May 12 on consent	
4/21/75	Filed Stipulation adjourning oral argument of pre-trial motions to May. 12.	
5/12/75	Motion for Supression of Evidence, motion for discovery & Inspection	

DATE	PROCEEDINGS
1/75	& Bill of Particulars and Motion for an Order granting inspection of Grand Jury Minutes - Judge Port rules on motions for discovery and inspection where there was a dispute and ruled on each individually as stated. Motion for Suppression of Evidence - Adjourned to trial judge.
1/13/75	Filed Memorandum of Law in support of motion to suppress
1/18/75	Filed Government's Memorandum of law in opposition to defts motion to Suppress.
1/8/75	Filed Endorsement of Judge MacMahon referring motions to Trial Judge
1/9/75	Filed Endorsement of Lloyd F. MacMahon on Omnibus Motions filed 3/21/75 "9/5/75 The within motion to suppress is denied. Opinion to follow. So Ordered. Lloyd F. MacMahon, USDJ"
1/8/75	Filed Motion and Order compelling Testimony of Dominick J. Galoni Filed Motion and Order compelling Testimony of Frank Cedrone
1/7/75	Case called - both sides ready. Jury drawn and sworn at 11:12 a.m. Govt. opens, Deft. opens. Trial continued. Mr. Lowe makes an application in absence of jury to Amend Bill of Particulars. Court stands for short recess. Court meets.
1/75	Trial Continued
1/75	Trial Continued. Gov't. rests. Deft. moves for Judgment of acquittal on grounds stated. Motion denied. Defense rests, Govt. rests. Attorneys sum up. 4:43 pm to 5:15 pm Judge MacMahon Charges Jury. Alternate jurors excused. Mr. Palmieri moves for mistrial on grounds stated. Motion denied. at 12:45 a.m. on 9/20/75 Jury come into Court-defendant found Guilty as charged. Jury polled. Exhibits returned to the respective Counsel. Mr. Palmieri moves to set aside verdict on grounds stated. Motion denied. Judge MacMahon sets Nov. 13, 1975 at 10:00 at Syracuse for sentencing. Pre-sentence investigation is ordered. Deft. continued on own recognizance.
1/75	Filed Government's Proposed Instructions, Court Exhibit # 1, and # 2.
2/20/75	The Court advised the defendant of his right to speak in his own behalf, defendant declines, his attorney speaks. Defendant is sentenced to two (2) years, pursuant to T18, USC § 3651 as amended, with provision that he be confined in a jail-type institution for a period of six months, as provided in the aforesaid section. Execution of the remainder of the sentence suspended, and defendant is placed on probation for the remainder of the sentence, to commence upon expiration of confinement, subject to the standing probation order of this court. Special condition of probation being that defendant resign from the bar. Deft. advised of right to appeal. Deft. permitted to appeal in forma pauperis. Stay of execution pending appeal is granted.
2/20	Filed Judgment- Stayed until decision from Court of Appeals.
1/20	Filed Notice of Appeal - pauper per Judge MacMahon.
1/25	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
1/28	Filed receipt from CCA, 2nd Cir. for papers sent.
1/75	Filed Order of C.C.A. Setting time schedule for appeal.
2/17/75	Filed Notice of Motion and Affidavit returnable 12/15/75 for Order to proceed in forma pauperis.
1/17/75	Filed Memorandum of Judge MacMahon denying application to appeal in forma pauperis.
1/29	Filed Copy of Appeal time schedule.
1/19/76	Filed Briefing Schedule set by C.C.A.
1/20/76	Filed 3 transcripts of proceeding 9/18/75; 9/19/75; and 9/17, 18, 19 & 20, 1975, held before Judge MacMahon.
1/22/76	Sent Supplemental Record on Appeal to CCA, 2nd Cir.



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

VITO M. PASTORE,

Defendant.

INDICTMENT

Crim. No. 74-CR-76

Vio: 26 U.S.C. 7206(1)

COUNT I

THE GRAND JURY CHARGES:

That on or about April 4, 1972, in the Northern District of New York, VITO M. PASTORE, a resident of Auburn, New York, did wilfully and knowingly make and subscribe a Form 1040 U.S. Individual Income Tax Return for the year January 1 - December 31, 1971, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Return he did not believe to be true and correct as to every material matter in that the said Return reported gross income from wages in the amount of \$1,536.00, interest income in the amount of \$273.18, and gross business receipts in the amount of \$17,109.00, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated.

In violation of Title 26, United States Code, Section 7206(1)

A TRUE BILL

\_\_\_\_\_  
FOREMAN OF THE GRAND JURY

- 1 -

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Appellee,

-vs-

VITO M. PASTORE,

Defendant-Appellant.)

NOTICE OF APPEAL

Crim. No. 74-Cr-76

NOTICE IS HEREBY GIVEN, that Vito M. Pastore, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment convicting him of a violation of Section 7206(1) of Title 26 of the United States Code entered in this action on the 20th day of November, 1975, and from each and every part thereof.

Dated: November 20, 1975

Yours, etc.,

PALMIERE, PASSERO & CRIMI  
Attorneys for defendant,  
Vito M. Pastore  
Norman A. Palmiere, of counsel  
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Suite 700-One East Main Street  
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Tel: (716) 325-2110

TO: CLERK, UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

TO: UNITED STATES ATTORNEY  
FOR THE NORTHERN DISTRICT OF NEW YORK

PALMIERE, PASSERO  
AND CRIMI  
ATTORNEYS AT LAW  
100 WILDER BLDG.  
ROCHESTER, N.Y.  
14614

1 He had a service that he could provide to Ron-Orc,  
2 and he could provide that service, and he was paid  
3 for it, and there is no question that he failed to  
4 report it as gross income on his tax return, and we  
5 submit that that fact has been proven beyond any doubt,  
6 based upon a reason, and we request that you return  
7 a verdict of guilty.

8 THE COURT: We will take a short recess,  
9 and then the Court will instruct the jury. I want to  
10 get the case into your hands tonight while the evidence  
11 is still fresh in your minds, and right after you have  
12 heard the arguments of the lawyers, and so forth. We  
13 will take a very brief recess.

14 (After a brief recess, the proceedings  
15 were resumed.)

16 THE COURT: Ladies and gentlemen,  
17 now, I am the exclusive judge of the law, and I hate  
18 to interrupt one of the lawyers, but he was getting  
19 into a new area, but concerning the law, I am the  
20 exclusive judge of the law in this Court, so you must  
21 accept the law as I give it to you, whether or not  
22 you agree with it, or whether or not you think that  
23 the law ought to be something different from what I  
24 tell you it is.

25 Now, just as I am the exclusive judge

1 of the law, you and you alone are the exclusive judges  
2 of the facts. You and you alone decide what weight  
3 you will give to the evidence. You and you alone decide  
4 which witnesses you are going to believe, and you and  
5 you alone ultimately decide whether this defendant  
6 is guilty or not guilty of the charges made against  
7 him in this indictment.

8 Now, how do you go about finding the  
9 facts? Finding the facts is merely a process by  
10 which you, the jury, consider all of the exhibits  
11 which have been received in evidence, consider the  
12 testimony of all of the witnesses, both on direct  
13 and on cross-examination, sift out what you believe,  
14 weigh it on the scale of the reasoning powers, discuss  
15 it with your fellow jurors, and decide just where  
16 the truth lies in this case.

17 Now, in this connection, all evidence  
18 is of two general types: Direct evidence, and  
19 circumstantial evidence. Evidence is direct when  
20 the facts are established or sworn to by witnesses  
21 who have personal knowledge of it from something  
22 that they have seen, or observed or heard, and so on.  
23 Or when shown by an exhibit.

24 Circumstantial evidence simply means  
25 the drawing of a logical conclusion from other connected

1           facts. We all use that process in our daily lives.  
2           If someone walks into this room and his clothing  
3           is dripping with rain, even though you cannot see  
4           outdoors, you draw the logical conclusion that it is  
5           raining outside.

6           Now, not all circumstantial evidence  
7           calls for such a compelling conclusion, but the  
8           process is no different, and you use it in your daily  
9           lives, and you use it here. Draw a logical conclusion  
10           of facts shown in the evidence.

11           Now, no greater certainty is required  
12           when evidence is circumstantial than when it is direct  
13           information, and in either case the jury must be  
14           satisfied of the defendant's guilt beyond a reasonable  
15           doubt, before it can convict.

16           Now, it is your memory of the evidence  
17           that controls. It is not the way I remember it, and  
18           it is not necessarily the way Counsel remembers it.  
19           I have no intention here of summarizing this evidence.  
20           The case has not been overly long, and you have just  
21           listened to two summations setting forth opposing  
22           views of what this evidence shows.

23           Now, to the extent that the argument  
24           of Counsel as to what this evidence shows squares  
25           with your own memory of the evidence, you can accept

1                   what they say, but to the extent that you have a  
2                   different recollection of the evidence, you are  
3                   bound by your oath to rely on your memory, and to  
4                   reject what Counsel say.

5                   Now, one of your most important  
6                   functions is to determine which witnesses you are  
7                   going to believe, and this is so as to every witness,  
8                   whether called by the Government or by the Defense.  
9                   You are not to be influenced by the number of  
10                   witnesses called by either side. Your concern is not  
11                   with the quantity of the evidence, but with the quality  
12                   of it.

13                   The first test which you should apply  
14                   in determining the trustworthiness of the witness is  
15                   to measure what he says against your plain, everyday  
16                   common sense. You are not bound to believe unreasonable  
17                   statements or to accept testimony that insults your  
18                   intelligence just because the statements are made  
19                   under oath in a courtroom.

20                   You saw the witnesses in this case.  
21                   In deciding whether or not to believe a witness,  
22                   you should consider not only what he said, but his  
23                   manner on the witness stand. How did the witness  
24                   impress you? I noticed that you were watching each  
25                   of these witnesses as they testified. Obviously you

1 were sizing them up. Was the witness' version of  
2 the facts straightforward? Was he trying to conceal  
3 anything? Was he being frank and candid with you?  
4 Was he just parroting answers? Is he interested in  
5 any way in the outcome of this case? How strong or  
6 weak was his memory of important events?

In short, can you rely on him?

24 Now, the defendant, Vito Pastore,  
25 did not take the witness stand. A defendant is not

1 required to take the witness stand and testify in his  
2 own behalf. He has no burden of proof to sustain  
3 this case. He has denied the charges made against  
4 him by his plea of not guilty, and he is presumed to  
5 be innocent. The fact that he has not testified cannot  
6 be taken into consideration by you in any manner. You  
7 may not permit that fact to weigh in the slightest  
8 degree against him, nor should it even enter into  
9 your decisions or your deliberations in any way.

10 Now, the witness Cedrone and Angelo,  
11 both testified that they participated in the scene which  
12 resulted in the crimes charged here. If you believe that  
13 then they were accomplices, and you can consider and  
14 you should consider that fact in determining their  
15 credibility and in weighing their testimony. Obviously  
16 a witness is not incapable of telling the truth about  
17 what he knows just because he is an accomplice, but  
18 you must, nevertheless, examine his testimony with  
19 special care and act upon it with caution.

20 In the prosecution of crime, the  
21 government is frequently called upon to use persons  
22 who are accomplices. Often it has no choice. They  
23 are properly used. After all, the government must  
24 rely upon witnesses to transactions, whoever they are.  
25 Otherwise, in many instances, it would be difficult

1 to detect and to prosecute wrongdoers.

2 Finally, it happens that only those  
3 who are on the inside can give evidence which is  
4 material and important to the case. There is no  
5 requirement that the testimony of an accomplice be  
6 corroborated, that is, that it be backed up or  
7 supported by others. You may convict upon the  
8 testimony of an accomplice alone, if you believe it.

9 The credibility of Cedrone and Galloni,  
10 like that of all of us, is for you and you alone to  
11 determine, taking into account, of course, the interest  
12 of the witness, his motive, any inducement or  
13 consideration that he may have received from the  
14 government, or may hope to receive from the government,  
15 and you still must be fair toward the defendant in  
16 any other evidence which you recall, which may  
17 reasonably be considered by you to influence or to  
18 color his testimony.

19 Now, I have forgotten the witness'  
20 name, but he testified that he had been engaged  
21 in handwriting analysis for a number of years.  
22 He made a comparative study of the defendant's admitted  
23 signature and handwriting, and the questioned  
24 signatures and handwriting appearing on the check  
25 and other documents received in evidence. He testified

1                   that in his opinion all but two of the checks had  
2                   been signed -- all of the checks had been signed  
3                   by the same person.

4                   You may, of course, give consideration  
5                   to his opinion, but you are not bound by it. You  
6                   may, and you should make the comparison yourselves  
7                   of a handwriting appearing in the endorsement on the  
8                   check, and the handwriting appearing in the questioned  
9                   documents, and in the defendant's exemplar and sample  
10                   of his own handwriting, as well as you should make  
11                   that comparison with the samples of the handwriting  
12                   of the witnesses Cedrone and Galloni, and you should  
13                   also consider whether under the circumstances either  
14                   Cedrone or Galloni, or the defendant, had any motive  
15                   or purpose to falsify or to change their handwriting  
16                   so as to mislead the handwriting expert, or exculpate  
17                   themselves or excuse themselves, or escape, perhaps,  
18                   persecution.

19                   Now, if you find that any witness has  
20                   deliberately lied with respect to any material factor  
21                   in the evidence offered in this trial, you may, if  
22                   you wish, accept as much of the witness' testimony  
23                   as you believe, or if you wish, you can reject the  
24                   entire testimony of such a witness.

25                   Now, before discussing the specific

1 charge made here, I want to remind you that an  
2 indictment is a mere accusation. It is not evidence  
3 of the truth of the charge made, and you are to draw  
4 no inferences of guilt from the mere fact that this  
5 defendant has been indicted. An indictment simply  
6 means that the defendant has been accused of a crime  
7 and, as I told you earlier, he has denied the charges  
8 made against him by his plea of not guilty. The  
9 defendant has no burden of proof to sustain in this  
10 case. He is under no obligation to provide any  
11 documents or any witnesses. He is presumed to be  
12 innocent, and this presumption of innocence continues  
13 throughout the trial and during the deliberations of  
14 the jury. The presumption of innocence is overcome  
15 when, and only when the government establishes the  
16 guilt of the defendant beyond a reasonable doubt.

17 Now, what do I mean by the phrase,  
18 "beyond a reasonable doubt"?

19 As the phrase implies, beyond a  
20 reasonable doubt is a doubt that is based upon reason,  
21 and reason which appears in the evidence, or in the  
22 lack of evidence. It is not some vague, speculative,  
23 imaginary doubt, nor a doubt based upon an emotion  
24 or sympathy, or upon what some juror might regard as  
25 an unpleasant duty. The government is not required to

1 prove the defendant's guilt beyond every possible  
2 doubt nor to an absolute or mathematical certainty  
3 because such measure of proof would be humanly  
4 impossible in human affairs.

5 You should review the evidence as  
6 you remember it. Sift out the testimony which you  
7 believe. Discuss it, compare your views of the  
8 evidence with that of your fellow jurors. If that  
9 process produces a solemn belief, or conviction in  
10 your mind, such as you would be willing to act upon  
11 if this were an important matter of your own, then you  
12 may say that you have been then convinced beyond a  
13 reasonable doubt.

14 On the other hand, if your mind is  
15 wavering or so uncertain that you would hesitate  
16 before acting if this were an important matter of  
17 your own, then you have not been convinced beyond  
18 a reasonable doubt and you must render a verdict of  
19 not guilty.

20 We will now discuss the case at hand.  
21 The defendant here, the indictment here, charges  
22 the defendant, Vito Pastore, with violation of a law  
23 of the United States, which provides that any person  
24 who illegally makes and subscribes any return which  
25 contains or is verified by a written declaration that

1       it is made under penalty of perjury, and which he  
2       does not believe to be true and correct as to every  
3       material matter, shall be guilty of a crime. In  
4       order to convict a defendant on these charges, based  
5       on a violation of that law, the government must prove  
6       to your satisfaction beyond a reasonable doubt the  
7       following four elements:

8                   1. That the return in question was  
9       signed by the defendant. The defendant's return on  
10      Form 1040 for the tax year ending December 31, 1971  
11      is in evidence as Government's Exhibit 1, and there  
12      is no dispute that the defendant signed that return.

13                  The second element is that the return  
14       must be one that contains or is verified by a written  
15       declaration that it was made under penalty of perjury.  
16       There is no question here whatever that the tax  
17       return in evidence as Government's Exhibit 1 contained  
18       and was verified by a written declaration that it was  
19       made under penalty of perjury.

20                  The third element is that a maker,  
21       a person signing the return must believe that the  
22       return is true and correct as to every material matter.  
23       Now, by true and correct, I mean accurate and complete.  
24       By material matter, in this case, I mean a large and  
25       substantial understatement of gross income which this

1 defendant received in the year 1971.

2 Now, what the defendant believed to  
3 be true, or not true when he signed the return,  
4 obviously depends upon what was in his own mind.

5 We have no way of looking into the  
6 defendant's own mind except as we can infer by  
7 circumstantial evidence of what was in his mind  
8 from the way he handled his business affairs, from  
9 what he says, and from how he acted.

10 Now, if the defendant signed the return  
11 in good faith, and honestly believed that it was true  
12 and correct as to every material matter, he has not  
13 committed a crime, and he should be acquitted, even  
14 though the return is inaccurate or in such a case,  
15 even if the return is not actually true or correct, he  
16 is simply laboring under an honest mistake and  
17 therefore would not be signing a return which he  
18 himself believed was untrue.

19 So you see, the question here is what  
20 did the defendant himself honestly believe as to whether  
21 he was reporting all of the income which he had received  
22 during the calendar year 1971?

23 In determining whether the defendant  
24 believed the return to be true and correct, or whether  
25 he knew and believed that it was false and incorrect,

1       you should look at all of the circumstances surrounding  
2       the transactions involved here. You should ask yourself  
3       Were the transactions carried on in the usual, normal,  
4       open and straightforward way of doing business,  
5       or if not, why not? Was currency used unnecessarily?  
6       Were the usual records kept of these transactions?  
7       Were the transactions straightforward and out in the  
8       open, or were they devious? Did the defendant keep  
9       or fail to keep the usual records of such transactions,  
10       or the usual records of men engaged in the legal  
11       profession, and if not, why not?

12                   You should also consider any other  
13       evidence or circumstances which you deem relevant  
14       to determine whether the defendant believed the return  
15       to be true and accurate, or whether he knew full well  
16       and believed that it was false.

17                   In determining whether the defendant  
18       believed the return in question was true and correct  
19       as to every material fact, you must determine whether  
20       there was a large and substantial understatement of  
21       his gross income, or whether there was no understatement  
22       at all, or if there was an understatement, whether it  
23       was insignificant. You should also compare the size  
24       of the alleged false statements of gross income shown  
25       on the return with the total gross income you find

1                   that the defendant received.

2                   Now, in this connection, there has  
3                   been some argument here about what is income. We  
4                   are told in the instructions of Form 1040, which  
5                   most of us have to fill out, what constitutes income.  
6                   And in a word, income is any money received during  
7                   the taxable year, the calendar year of 1971, from  
8                   services of any kind rendered, from rent, from  
9                   dividends, from interest on bank accounts, and then  
10                  we are all given a form which gives us examples: Wages,  
11                  salaries, bonuses, commissions, fees, tips, gratuities,  
12                  dividends, earnings from savings and loan associations,  
13                  savings banks, credit unions, interest on tax refunds,  
14                  interest on bank deposits, bonds, notes, interest  
15                  on United States savings bonds, interest on other  
16                  bonds issued after October 9, 1969 by State and local  
17                  governments, and profits or shares of profits from  
18                  businesses or professions, shares of profits for  
19                  partnerships and small business corporations, pensions,  
20                  annuities, and endowments. Profits from the sale or  
21                  exchange of real estate, security or other property,  
22                  rents and royalties, money from estates for trust  
23                  income, unemployment benefits and alimony.

24                  Then from the wars, refunds of the  
25                  State and local taxes, and even embezzled or other

## 1 illegal income.

2 Now, money that you have accumulated,  
3 savings and money that you inherit, and money that is  
4 given to you, and money that you borrowed, and the  
5 like, is not income.

Now, the question here specifically  
is whether these checks which were cashed by this defendant,  
according to the evidence of the bank officers and  
tellers, constituted income, money payable to him  
for his use and benefit as he saw fit, or was it moneys  
as argued, that he received in trust to disburse in  
behalf of his clients.

Now, the government does not have to prove the exact amount of the under-estimated gross income. But it must prove beyond a reasonable doubt that the under-estimate of gross income was large and substantial, and not small and insignificant, so if the statement of gross income is generally accurate, then that would not be a false statement of a material matter. If the under-estimate of gross income is large and substantial, so that the gross income reported varies greatly from the true income, then it is a material matter.

24 The government here contends that the  
25 proof showed beyond a reasonable doubt that the

1 defendant knew that the return intentionally under-  
2 estimated his gross income for the year in question,  
3 and that the defendant therefore did not believe the  
4 return to be true and correct as to every material  
5 matter.

6 As I told you earlier, by his plea  
7 of not guilty, the defendant denied that he made any  
8 such false returns.

9 Now, knowledge here does not mean  
10 that the defendant must be aware that he is violating  
11 the law. It simply means that he must know, or be  
12 aware of the existence of substantially more gross  
13 income in 1971 than he was stating on his tax return.  
14 That is, he must know that he has more income than  
15 he is stating and he must under-estimate it voluntarily,  
16 deliberately, and on purpose and not because of a mistake,  
17 misunderstanding, confusion, ignorance, carelessness or  
18 other innocent reason. Knowledge is used in its normal  
19 sense of actual knowledge, that is, being consciously  
20 aware or sure of the existence or non-existence of  
21 other income.

22 Now, the fourth element of this offense,  
23 is that the defendant must have acted knowingly and  
24 wilfully. An act is wilful if it is done voluntarily  
25 and here done with a specific intent to sign a tax

1                   return as true and correct when the signer knows  
2                   and believes himself that the return is not true  
3                   and not correct, and when he does this for the purpose  
4                   of concealing from the government the true income  
5                   or other material facts that an accurate and complete  
6                   and true full return would show.

7                   The law requires that a person must  
8                   act knowingly and wilfully so that no one will be  
9                   convicted for an innocent mistake, stupidity,  
10                   carelessness, or other innocent reasons. It is thus  
11                   not sufficient for the government merely to prove  
12                   that the return was prepared in haste, recklessly, or  
13                   that the underlying records were kept in a careless  
14                   or unwise manner. In determining whether the  
15                   defendant acted knowingly and intentionally, again  
16                   you must look into his mind. You may thus infer  
17                   knowledgeable intent from the way the defendant acted  
18                   here. The statements he made and all of the surrounding  
19                   circumstances.

20                   In short, actions speak louder than  
21                   words when we are trying to look into a person's mind.  
22                   In determining what was the defendant's intent, you  
23                   should take into consideration any evidence of  
24                   concealment of facts relating to his income or attempts  
25                   to conceal his income. Any covering up of the sources

1 of income. Handling one's affairs so as to avoid  
2 making the usual records. Any unnecessary use of cash.  
3 The use of fictitious names, and the use of fictitious  
4 transactions, and any other things which you find  
5 likely to mislead or to conceal what is really going on.

6 You may find evidence of intent to  
7 commit the crime of making a return which was incorrect  
8 as to material matters even though there is also some  
9 intent or desire to suppress information as to acts  
10 which are unrelated to tax returns including other  
11 criminal acts, but in that connection, I again caution  
12 you and instruct you that the only charge with which  
13 this defendant stands on trial here is a charge of  
14 filing, knowingly filing a false tax return.

15 You may find that the statement here  
16 was made wilfully if you find that the defendant  
17 knew that he had received substantially more gross  
18 income than he reported on his return, and he  
19 deliberately understated his gross income, with an  
20 intention, or for the purpose of making a tax return  
21 which was untrue, or substantially incorrect as to a  
22 material fact.

23 To sum up, then, before you can convict  
24 the defendant, you must find beyond a reasonable doubt  
25 that the defendant signed the return in question; two,

1 that the return contained or was verified by a  
2 written declaration that it was made under penalty  
3 of perjury; three, that the defendant believed the  
4 return was not true and correct as to every material  
5 fact; and fourth, that he wilfully and knowingly  
6 signed or made the return which he knew was false  
7 and incorrect.

8 Now, if you find that the government  
9 has established -- has failed to establish each and  
10 every one of these elements beyond a reasonable doubt,  
11 then you should acquit this defendant. If, on the  
12 other hand, the government has established each of  
13 every one of these elements beyond a reasonable doubt,  
14 then you should convict him.

15 You are instructed that the question  
16 of possible punishment of the defendant in the event  
17 of a conviction is no concern of yours, and it should  
18 not enter into or influence your deliberations in any  
19 way. The duty of imposing sentence in the event of  
20 a conviction rests exclusively upon the Court. Your  
21 function is to weigh the evidence in the case and  
22 determine the guilt or non-guilt of the defendant  
23 solely upon the basis of such evidence, and the law  
24 as I have given it to you in this charge.

25 When you retire to the jury room, you

1 will elect one of your members to act as your Foreman  
2 or Forelady, and to speak for you. You will treat  
3 one another with consideration and respect, as I know  
4 you will. If differences of opinion arise, your  
5 discussions should be dignified and calm, and  
6 intelligent. Your verdict must be based upon the  
7 evidence and the law. The evidence which was presented  
8 in this case, as you remember it, and the law as I have  
9 given it to you in this charge. You are each entitled  
10 to your own opinion. No juror should acquiesce in  
11 a verdict against his individual judgment. Nevertheless,  
12 no one should enter a jury room with such pride of  
13 opinion that he or she would refuse to change his or  
14 her mind no matter how convincing the arguments of  
15 fellow jurors.

16 Discussion and deliberation are part  
17 of our democratic jury way, and your deliberations  
18 should be approached in that spirit. Talk out your  
19 differences. Each of you should, in effect, decide  
20 the case for himself or herself, after thoroughly  
21 reviewing the evidence, and frankly discussing it  
22 with your fellow jurors, with an open mind and with  
23 a desire to reach a verdict. If you do that, you will  
24 be acting in the true democratic process of the  
25 American jury system.

1 There are twelve of you on this jury.  
2 and the alternates will be excused with the thanks  
3 of the Court before you retire for your deliberations.  
4 Any verdict must be the unanimous verdict of all of  
5 you, and it must represent the honest conclusions of  
6 each of you. The Court will send into the jury room  
7 a copy of this indictment and all of the exhibits  
8 which have been received in evidence.

9 I submit the case to you with every  
10 comfort and confidence that you will fully measure  
11 up to the oath which you took as members of the jury,  
12 to decide the issue submitted to you fairly and  
13 impartially, and without fear or favor.

14 Now, members of the jury, if you find  
15 that the government has failed to establish the guilt  
16 of this defendant beyond a reasonable doubt, you should  
17 acquit him. If you find that the defendant has not  
18 violated the law, you should not hesitate, for any  
19 reason, to render a verdict of not guilty.

25 Are there any exceptions, gentlemen,

1 and if so, I will hear you at the side bar.

2 MR. PALMIERE: Yes, I have one.

3 (Whereupon, the following took place  
4 at the bench, out of the hearing of the jury:)

5 MR. PALMIERE: I except to that portion  
6 of the Court's charge where he indicated, where the  
7 Court indicated that the expert witness testified  
8 that in comparing the defendant's known handwriting --  
9 well, where the expert witness testified that in  
10 comparing the defendant's known handwriting with  
11 documentary evidence, the expert indicated that the  
12 same person who signed the known documents also  
13 signed the others.

14 My recollection of the testimony  
15 was that he only compared the known handwriting of  
16 the defendant with Exhibit 17.

17 THE COURT: Is that correct?

18 MR. LOWE: Yes, that is the \$5,000  
19 check.

20 THE COURT: Which is the known one.  
21 MR. PALMIERE: Exhibits 1, 5, 6, 7, and 8  
22 being the checks from the Auburn Community College.

23 THE COURT: I am not clear on this.  
24 I want to get it straight, but I am not straight on  
25 it now.

Which are the known ones?

MR. PALMIERE: All of these (indicating)

THE COURT: These are the income tax

returns, and the checks of the Auburn Community College?

MR. PALMIERE: That is correct.

THE COURT: All right. Now, which is the

MR. PALMIERE: The one right here.

THE COURT: And that is the only one?

Is that it? I will correct it, and thank you for calling it to my attention.

(Whereupon, the following took place  
before the Judge and the jury:)

THE COURT: I stated that some of the evidence with regard to the handwriting expert, what the handwriting expert did, was he compared the signature and handwriting to the tax return, Exhibit 1, and on Exhibits 5, 6, 7, and 8, which are checks to the Auburn Community College with the signature on one check, Exhibit 17, and that was the only comparison that he made with respect to this defendant's handwriting. There were, you will recall, some comparisons as well, of the handwriting of Cedrone and Galloni, and as I told you, you are not bound by that expert's testimony. You should make the comparisons yourself and decide

1                   whether they were written -- whether the challenged  
2                   documents were signed by the same person who made  
3                   the known signatures. Is that satisfactory?

4                   MR. PALMIERE: Yes, your Honor.

5                   THE COURT: All right, proceed.

6                   Will the guards please step forward?

7                   THE CLERK: The alternates are now  
8                   excused.

9                   (Whereupon, the guards were sworn by  
10                   the Clerk.)

11                   The jury may now retire to begin its  
12                   deliberations.

13                   (Whereupon, the jury retired to the  
14                   jury room.)

15                   MR. PALMIERE: Your Honor, I respectfully  
16                   now move for a mistrial based on the Government's  
17                   summation. I believe that the Government's allusion  
18                   to the defendant being responsible for a raid on  
19                   the residents of the Town of Fleming, and this was not  
20                   certainly borne out by the evidence. I do not think  
21                   that it was a fair comment based upon the evidence  
22                   in this case. And also his subsequent statements to  
23                   the effect that the defendant was involved in a  
24                   conflict of interest. It is not the charge here and  
25                   I believe that he did not have any right to say that.

I believe that the connotation, "conflict of interest," demonstrates the commission of a crime and to my knowledge, it is not a violation of the law of New York State for an attorney to represent an individual against -- strike that. I do not believe that it is a violation of New York State law for an individual to represent the same parties as long as the representative of that party does not involve the same transactions. In other words, Mr. Pastore could have, in my opinion and an interpretation of the laws of New York State, represented Mr. Cedrone with respect to other matters unrelated to the Fleming Sewer Project.

15 as Town Attorney?  
16 MR. PALMIERE: Yes, sir, that would be  
17 my opinion.

17 my opinion.  
18 THE COURT: Well, it seems to me that  
19 you are -- that isn't consistent with what you just  
20 said that the Government is accusing him of another  
21 crime.

21 crime.  
22 MR. PALMIERE: I am saying that the  
23 connotation of the Government accusing him of a  
24 conflict of interest -- the jury may believe that  
25 it is an accusation of another criminal act, and I am

1 merely saying --

2  
3 THE COURT: (Interrupting) I deny the  
4 motion. The defendant was an agent in the capacity  
5 of the Town Attorney, and there was no dispute in  
6 the evidence that he and Cedrone formed Ron-Ore while  
7 he was Town Attorney, and he had some kind of way for  
8 Ron-Ore to get the checks cashed and I think that it  
9 is impossible to try this case in light of those  
10 transactions without showing that corruption. I do not  
11 think that in these circumstances that in view of  
12 the Court's instructions at the time, as well as in the  
13 charge, that the jury would not be concerned with any  
14 other charges other than the filing of the false return,  
15 that there is anything prejudicial, and I deny the  
motion.

16 MR. PALMIERE: I except, your Honor.

17 THE COURT: Off the record.

18 (Discussion off the record.)

19 THE CLERK: Court stands in recess.

20 (Whereupon, at 9:57 the following  
21 proceedings took place.)

22 (The jury was escorted into the  
23 courtroom and the following took place before the  
24 Judge and the jury:)

25 THE COURT: I have your note, and the

1                   jurors request the four charges from the bench  
2                   by the Judge. That note isn't quite clear, but I  
3                   think that what you want to know is what the four  
4                   elements of the crime charged are.

5                   You will recall I said, in summing up,  
6                   before you can convict the defendant you must find  
7                   that beyond a reasonable doubt:

8                   1. That the defendant signed the  
9                   return in question. There is no dispute about that.

10                  2. That the return contained or was  
11                  verified by a written declaration that it was made  
12                  under the penalty of perjury. There is no dispute  
13                  about that.

14                  3. That the defendant believed the  
15                  return was not true and correct as to every material  
16                  matter. There is a sharp dispute about that.

17                  4. That he willingly and knowingly  
18                  signed and made that return. There is a dispute  
19                  about that.

20                  All right, you may retire and continue  
21                  your deliberations.

22                  (Whereupon, the jury was returned to  
23                  the jury room at 9:59 p.m.)

24                  THE CLERK: Court stands in recess.

25                  (The jury was escorted into the courtroom

1 at 12:08 a.m. and the following took place before the  
2 Judge and the jury:)

3 THE CLERK: Court is in session; please  
4 be seated.

5 THE COURT: I am advised by the Marshal  
6 that you have asked how much longer you must  
7 deliberate.

8 Of course, that is up to you. You are  
9 the ones who are to decide the case. I want to say  
10 to you that this is fundamentally a pretty simple case.  
11 Did the defendant have more income in the year 1971  
12 than he stated on his income tax return? Yes or no;  
13 to yourselves.

14 If he did have more income, did he know  
15 that he had more income?

16 If he knew that he had it, did he  
17 deliberately understate it on his return, contrary  
18 to what he himself believed, and did he do it  
19 intentionally, knowingly and wilfully?

20 Now, I don't think that is such a very  
21 difficult case on the evidence, in this case, to answer  
22 those questions; either yes or no.

23 And I would say to you, in a large  
24 proportion of cases that absolute certainty cannot be  
25 expected.

When it makes no impression upon the  
minds of so many other jurors who are equally honest,  
equally intelligent, and equally impartial.

16 If, on the other hand, the majority is  
17 for acquittal, the minority ought to ask themselves  
18 whether they might not -- whether they might not  
19 reasonably doubt the correctness of a judgment which  
20 was not concurred in by the majority.

1 comparison of views, and by arguments among the jurors  
2 themselves.

3 If a juror finds that a large majority  
4 of the jury is taking a different view of his view  
5 or her view, he or she should listen to their arguments,  
6 and with a distrust of his or her own judgment. A  
7 juror must not go to the jury room with a blind  
8 determination that the verdict shall represent his  
9 opinion of the case at that moment. A juror must  
10 not close his eyes to the arguments of men who are  
11 equally honest and intelligent as himself.

12 Now, this case has been on trial here  
13 for three or three and a half days. I ask you,  
14 therefore, to go back into the jury room in the light  
15 of this instruction, and do your best to reach an  
16 agreement and a verdict.

17 You may retire.

18 (Whereupon, the jury was returned  
19 to the jury room.)

20 THE CLERK: Court stands in recess.

21 (Whereupon, the jury returned to the  
22 courtroom at 12:45 a.m.)

23 THE CLERK: Court is now in session;  
24 please be seated.

25 Ladies and gentlemen of the jury, have

1 you agreed upon a verdict, and if so, how do you-  
2 find, and who shall say for you?

3 THE FOREMAN: We find the defendant  
4 guilty of Count 1 on the indictment.

5 THE CLERK: Harken, ladies and  
6 gentlemen of the jury, to your verdict as the Court  
7 has recorded. And you say that you find the defendant,  
8 Vito Pastore, guilty as charged, and so say you all?

9 (Whereupon, the jury answered in the  
10 affirmative.)

11 MR. PALMIERE: May I have the jury  
12 polled?

13 THE COURT: Poll the jury.

14 THE CLERK: Ladies and gentlemen, as your  
15 name is called, please state your verdict.

16 Irene Bolowsky.

17 JUROR NO. 1 (Bolowsky): Guilty.

18 THE CLERK: Donald C. Slate.

19 JUROR NO. 2 (Slate): Guilty.

20 THE CLERK: Paul J. Mattle.

21 JUROR NO. 3 (Mattle): Guilty.

22 THE CLERK: Nina B. Baxter.

23 JUROR NO. 4 (Baxter): Guilty.

24 THE CLERK: Mary G. DeBoalt.

25 JUROR NO. 5 (DeBoalt): Guilty.

1 THE CLERK: John Brown.

2 JUROR NO. 6 (Brown): Guilty.

3 THE CLERK: Charles B. Gladle.

4 JUROR NO. 7 (Gladle): Guilty.

5 THE CLERK: Norman Berlinski.

6 JUROR NO. 8 (Berlinski): Guilty.

7 THE CLERK: Graco M. Seiter.

8 JUROR NO. 9 (Seiter): Guilty.

9 THE CLERK: Betty J. Meli.

10 JUROR NO. 10 (Meli): Guilty.

11 THE CLERK: Walter G. Fifler.

12 JUROR NO. 11 (Fifler): Guilty.

13 THE CLERK: Joseph G. Mullen.

14 JUROR NO. 12 (Mullen): Guilty.

15 THE COURT: All right. I want to thank  
16 you for the conscious attention which I know that  
17 you have given to the case, and for deciding the case.  
18 Had you not decided it, it would only mean that we  
19 would have to try this all over again, and that would  
20 have been a burden on everyone.

21 I was afraid that if I let you go over  
22 the weekend, the evidence would be gone from your mind.  
23 And I did not frankly think it would take you this  
24 long, as it did, to decide. I think that I could have  
25 decided it in about ten minutes. But that decision was

1 yours, and I am sorry that you stayed so late.

2 I had no choice other than to lock  
3 you up for the whole night, and let you deliberate  
4 tomorrow, and that wasn't feasible because there just  
5 wasn't a place where we could get you all together,  
6 and we had to have you all under one roof, but we  
7 would have had to work it out some way.

10 (Whereupon, the jury was excused.)

11 MR. PALMIERE: Your Honor, I respectfully  
12 move this Court to set aside the verdict on the ground  
13 that it is against the weight of criminal evidence.

14 THE COURT: Denied.

15 MR. PALMIERE: Exception.

16 THE COURT: November 13th for sentencing,  
17 at 10 o'clock, here in Syracuse. What is the bail  
18 status?

19 MR. PALMIERE: The defendant is on his  
20 own recognizance, and I would like it continued.

21 MR. LOVE: All right with the Government.

22 THE COURT: The defendant is released  
23 on his own recognizance pending the sentence, and I  
24 want a pre-sentence report.

25 I might say that, gentlemen, I certainly

1 appreciate the professional way in which both of  
2 you tried this case. The defendant had unusually  
3 fine representation. That is all we can ask in this  
4 process.

5 MR. PALMIERE: Thank you.

6 THE CLERK: Court stands in recess  
7 until 10 a.m. on Monday.

8 (Whereupon, the proceedings were  
9 adjourned.)

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United States of America vs.

Vito Pastore  
DEFENDANT

United States District Court for

Northern District of New York

DOCKET NO. 74-CR-12

COUNSEL

In the presence of the attorney for the government  
the defendant appeared in person on this date

Month Day Year  
11 20 75

PLEA

WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon was told he need not have counsel.

WITH COUNSEL  Norman Palmeiro

(Name of Counsel)

JUDGMENT

GUILTY, and the court being satisfied that  NOLO CONTENDERE,  NOT GUILTY

NOT GUILTY. Defendant is adjudged

There being a guilty finding,  GUILTY.

SENTENCE  
OR  
PROBATION  
ORDER

Defendant is found guilty as charged in the indictment of Plying false statements in violation

of Title 20 U. S. C. Section 1251

The court asked whether defendant had anything to say why judgment should not be pronounced. Because defendant chose to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and sentenced that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years. Pursuant to Title 18, United States Code, Section 3651 as amended, with provision that he be confined in a jail-type institution for a period of Six (6) months, as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and defendant is placed on probation for the remainder of the sentence, to commence upon expiration of confinement, subject to the standing probation order of this Court.

SPECIAL  
CONDITIONS  
OF  
PROBATION

Being that the defendant resigns from the Bar.

ADDITIONAL  
CONDITIONS  
OF  
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT  
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

In accordance with the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or his qualified officer.

SIGNED BY  
 U.S. District Judge

U.S. Magistrate

*Lloyd F. MacMahon*  
s/ Lloyd F. MacMahon

CERTIFIED AS A TRUE COPY ON

THIS DATE 11/20/75

BY *E. A. Knut*  
CLERK  
(X) DEPUTY

DATE Nov. 20, 1975



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

AFFIDAVIT OF SERVICE BY MAIL

-vs-

VITO M. PASTORE,

Docket No. 75-1428

Defendant-Appellant.

STATE OF NEW YORK )  
COUNTY OF MONROE ) SS:  
CITY OF ROCHESTER )

JUDITH HOPKINS, being duly sworn, deposes and says:  
deponent is not a party to the action, is over 18 years of age and resides at  
Rochester, New York.

On February 10, 1976, deponent served the within Brief for  
Appellant and Appendix for Appellant upon James M. Sullivan, Jr., United  
States Attorney, Northern District of New York, George Lowe, Esq., of counsel  
attorneys for United States of America in this action, at Federal Building,  
Syracuse, New York, the address designated by said attorney for that purpose by  
depositing a true copy of same enclosed in a post-paid properly addressed wrapper  
in a post office under the exclusive care and custody of the United States  
Postal Service within the State of New York.

Judith Hopkins  
JUDITH HOPKINS

Sworn to before me this  
10th day of February, 1976.

Norman A. Palmer

NOTARY PUBLIC  
State of New York  
County of Monroe  
LAW OFFICES OF PALMER & PALMER